Supreme Court, U.S.
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IN THE

Supreme Court of the United States

E. K. McDANIEL, Warden, Ely State Prison,
FRANKIE SUE DEL PAPA, Attorney
General of the State of Nevada,
Petitioners,

v.

EDWARD F. WILLS, JR.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. IS A PETITION FOR A WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254 A "SECOND OR SUCCESSIVE APPLICATION" PURSUANT TO 28 U.S.C. § 2244(b)(3)(A) REQUIRING THE APPLICANT TO MOVE IN THE APPROPRIATE COURT OF APPEALS FOR AN ORDER AUTHORIZING THE DISTRICT COURT TO CONSIDER THE APPLICATION IN THE CIRCUMSTANCE WHERE THE APPLICANT HAS HAD A PRIOR PETITION PURSUANT TO 28 U.S.C. § 2254 FULLY ADJUDICATED ON THE MERITS?

2. DID THE COURT OF APPEALS PROPERLY GRANT A CERTIFICATE OF APPEALABILITY PURSUANT TO 28 U.S.C. § 2253(c)?

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IN THE
SUPREME COURT OF THE UNITED STATES

E. K. McDANIEL, Warden, Ely State Prison,
FRANKIE SUE DEL PAPA, Attorney General
of the State of Nevada,
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v.

EDWARD F. WILLS, JR.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Petitioners, above-named, file this petition for writ of certiorari and seek an order vacating the August 12, 1999, Order of the United States Court of Appeals for the Ninth Circuit ("Court of Appeals"), in which the Court of Appeals: (1) reversed the decision of the district court that it lacked

jurisdiction; and (2) ruled that Respondent Edward F. Wills ("Wills") did not need to seek permission from that Court in order to file a successive petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, notwithstanding the fact that Wills had a previous petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 fully adjudicated on the merits.

I. OPINIONS AND JUDGMENTS BELOW

The Opinion of the Court of Appeals at issue was filed on August 12, 1999. Appendix A. The Order of the District Court was filed on January 5, 1999. Appendix B. A previous decision of the Court of Appeals was filed on September 23, 1994 (*Edward F. Wills v. George Deeds*, No. 91-16902). Appendix C. The first decision by the Court of Appeals relating to a federal habeas corpus petition challenging the same conviction was filed on March 7, 1991 (*Edward Francis Wills v. Harol L. Whitley*, No. 90-15159). Appendix D.

II. JURISDICTIONAL STATEMENT

The federal district court reviewed the matter, filed as a Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 by a Person in State Custody. Appendix B. The district court, recognizing the existence of two prior federal

habeas corpus petitions, including one fully adjudicated on the merits, concluded, pursuant to 28 U.S.C. § 2244(b)(3)(A), that it lacked jurisdiction to proceed further. Appendices B, C and D. Without briefing or oral argument, the Court of Appeals summarily reversed the district court on August 12, 1999. Appendix A. This petition for writ of certiorari is filed within ninety (90) days of the judgment of the Court of Appeals. 28 U.S.C. § 2101(c).[1] *See also* Sup. Ct. R. 20. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS

28 U.S.C. § 2244(b)(3)(A): "Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application."

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[1] Because this petition seeks review of an order from the Court of Appeals reversing the district court, it is not subject to the jurisdictional limitation found at 28 U.S.C. § 2244(b)(3)(E). This is in accord with this Court's finding of jurisdiction in *Stewart v. Martinez-Villareal*, 523 U.S. 637, 641-42 (1998).

28 U.S.C. § 2253(c)(2): "A certificate of appealability may issue under (1) only if the applicant has made a substantial showing of the denial of a constitutional right."

IV. STATEMENT OF THE CASE

The Petitioner has lawful custody of Wills pursuant to his conviction by a jury of two counts of first degree murder in 1976.[2] Appendix D. Wills is serving a life sentence. *Id.* On direct appeal, Wills raised the issue of whether the evidence was sufficient to support his conviction. *Id.* Subsequently, Wills raised a claim of ineffective assistance of counsel in the state courts. *Id.* Wills raised those two issues in his first federal petition for a writ of habeas corpus in 1987. Appendices C and D. The federal district court denied that petition on the merits. *Id.* The Court of Appeals affirmed the denial of the first petition on the merits. *Id.*

In 1989, Wills filed a second petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 attacking the same convictions. Appendix C. The federal district court denied Wills' petition, finding that Wills had abused the writ. *Id.*

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[2] The full facts of the case may be found at *Wills v. State*, 566 P.2d 1138, 1138-39 (Nev. 1977).

However, on appeal, the Court of Appeals concluded that issues contained in this second federal habeas corpus petition were unexhausted. *Id.* As a result, the Court of Appeals remanded the case to the district court with instructions to dismiss the petition without prejudice. *Id.*

In 1998, Wills filed his current petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Appendix B. The district court ruled it lacked jurisdiction and denied a certificate of appealability. Appendices B and E. Wills sought a certificate of appealability on that issue, which the Court of Appeals granted. Appendices F and G. The Court of Appeals summarily reversed, contrary to the clear and explicit language of 28 U.S.C. § 2244(b)(3)(A). Appendix A. Petitioners now seek review of this ruling by the Court of Appeals.

V. SUMMARY OF THE ARGUMENT

When a prisoner in state custody has a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 *fully* adjudicated on the merits, *any* subsequent petition is a "second" or "successive" petition pursuant to 28 U.S.C. § 2244(b)(3)(A). There has been much confusion about what

a "second" or "successive" petition is. Consideration of this case will allow this Court to consider that important question. Granting a writ of certiorari will also allow this Court to answer a question left unanswered two terms ago in *Stewart v. Martinez-Villareal*, 523 U.S. 627, 645 n. * (1998).

28 U.S.C. § 2253(c)(2) limits the jurisdiction of the Courts of Appeal to considering whether the petitioner has "made a substantial showing of the denial of a constitutional right." The Court of Appeals in this case granted a certificate of appealability on a question that was not constitutional at all. Therefore, the Court of Appeals lacked jurisdiction to act as it did.

VI. REASONS FOR GRANTING THE WRIT

1. A PETITION FOR A WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254 IS A "SECOND OR SUCCESSIVE APPLICATION" PURSUANT TO 28 U.S.C. § 2244(b)(3)(A) REQUIRING THE APPLICANT TO MOVE IN THE APPROPRIATE COURT OF APPEALS FOR AN ORDERING AUTHORIZING THE DISTRICT COURT TO CONSIDER THE APPLICATION IN THE

CIRCUMSTANCE WHERE THE APPLICANT HAS ALREADY HAD A PRIOR PETITION PURSUANT TO 28 U.S.C. § 2254 FULLY ADJUDICATED ON THE MERITS.

Granting certiorari on this question would permit this Court to correct the error committed by the Court of Appeals. More importantly, this Court's intervention would allow for uniformity of law and clarification about what constitutes a "second" or "successive" petition for a writ of habeas corpus under federal law.

While unpublished, the Court of Appeals holding in this case is contrary to clear language of 28 U.S.C. § 2244(b)(3)(A), which states: "Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." The Court of Appeals decision is also at variance with the Court of Appeals of another circuit, which held, under a virtually identical fact pattern, that the petitioner did need permission from the Court of Appeals to file a successive petition. *Graham v. Johnson*, 168 F.3d 762,

770-72 (5th Cir. 1999), *cert. pending*, June 21, 1999. The Fifth Circuit found that the date of the *first* federal habeas corpus petition dispositive to the legal requirement that a petitioner seek permission from the Court of Appeals before filing a "second or successive" federal habeas corpus petition. *Id.* at 786. *See In re Page*, 179 F.3d 1024, 1025 (7th Cir. 1999) (distinguishing between petitions dismissed for procedural grounds and those dismissed on the merits). *See also Vancleave v. Norris*, 150 F.3d 926, 928 (8th Cir. 1998) (petition "second or successive" because it was subject to "abuse of the writ" under former federal habeas corpus law).[3]

Additionally, there has been much confusion in the circuit courts about what exactly a "second or successive" petition *is* after this Court's decision in *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998). As this Court is well aware, *Stewart* involved this Court's determination that a prior dismissal of a claim because the claim was not "ripe" did not require a petitioner to seek permission from the Court of

[3] Arguably, the panel in this case also ignored its own circuit precedent in reaching its erroneous conclusion. *See Greenawalt v. Stewart*, 105 F.3d 1268, 1277 (9th Cir. 1997) (denying permission to file a successive petition after first petition denied on the merits and subsequent petition dismissed as unexhausted).

Appeals before filing a federal habeas corpus petition on the now "ripe" claim. *Id.* at 644-45.

Indeed, because this Court held that an "unripe" claim is similar to an unexhausted claim, this petition for certiorari will allow this Court to consider a question similar to the question it expressly chose not to answer in *Stewart*:

> This case does not present the situation where a prisoner raises a *Ford* claim for the first time in a federal petition filed after the federal courts have already rejected the prisoner's initial habeas application. Therefore, we have no occasion to decide whether such a filing would be a "second or successive habeas corpus application" within the meaning of AEDPA.

Id. at 645, n. *. The federal courts fully adjudicated Wills' first federal habeas corpus petition in 1991. When Wills filed what is clearly his second petition in 1989, long before the adoption of the AEDPA, the Court of Appeals chose to dismiss it without prejudice pursuant to *Rose v. Lundy*, 455 U.S. 509 (1984)[4]. Thus, the unanswered question in the *Stewart* footnote, what issues can be raised after a prior full

[4] The Court of Appeals was clearly wrong when it stated in its most recent opinion that it had previously determined that Wills' second petition was not successive. *Compare* Appendices A and C.

adjudication on the merits, can be answered under the facts of this particular case.

In effect, the ruling from the Court of Appeals rewards a prisoner such as Wills who files an unexhausted petition over those who "follow the rules." Had Wills exhausted the issues contained in his second federal habeas corpus petition in the state courts and that had delayed his journey into federal court until after the passage of the AEDPA, there is no doubt that he would be required to seek permission to file a successive petition under the provisions of 28 U.S.C. § 2244(b)(3). Instead, by going to the federal courts *first*, the Court of Appeals has rewarded Wills while a similarly situated petitioner who had exhausted his claims in state court *first* would be required to secure permission to file a successive petition.

Because this case presents a compelling opportunity to define an important issue of federal habeas corpus law—what constitutes a "second or successive" petition following a *full* adjudication of all claims in a prior petition—certiorari should be granted.

2. THE COURT OF APPEALS IMPROPERLY GRANTED A CERTIFICATE OF APPEALABILITY PURSUANT TO 28 U.S.C. § 2253(c).[5]

This Court's statutory certiorari review power is limited to "cases" that were "in" the Court of Appeals. 28 U.S.C. § 1254(1). In order for a case to have been "in" the Court of Appeals, the Court of Appeals must have had jurisdiction over the case. *Nixon v. Fitzgerald*, 457 U.S. 731, 743 (1982).

Before a federal habeas corpus petitioner can pursue an appeal from a district court's denial of relief in a § 2254 case, the petitioner must first obtain permission. 28 U.S.C. § 2253(c). This statute places a significant limitation on the jurisdiction of the Court of Appeals: "A certificate of appealability may issue under [28 U.S.C. § 2253(c)](1) only if the applicant has made a substantial showing of the denial of a *constitutional* right." 28 U.S.C. § 2253(c)(2) (emphasis added).

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[5] Petitioners acknowledge that much of this argument came from the brief of *amicus curiae* State of California in *Slack v. McDaniel*, No. 98-6322.

Whether a second federal habeas corpus petition is "second or successive" is not a constitutional question. *See Felker v. Turpin*, 518 U.S. 651, 664 (1996) (application of abuse of the writ doctrine as delineated by case law does not infringe on the Constitution). Because Wills' appeal did not involve a constitutional issue, let alone one of a "substantial" nature, the Court of Appeals could not have issued a certificate of appealability. Therefore, the Court of Appeals lacked jurisdiction over the appeal. As a result, the second or successive application question was never "in" that court. Consequently, the Court of Appeals erred in granting the certificate of appealability and ruling on Wills' appeal.

Most Circuit Courts of Appeal, including the Ninth Circuit, have held that without a certificate of appealability, they lack jurisdiction to consider an appeal from the denial of a federal habeas corpus petition. *Marmalejo v. United States*, 1999 U.S. Lexis App. 21636, *2 (2nd Cir. Sept. 10, 1999); *Morris v. Horn*, 187 F.3d 333, 339 (3rd Cir. 1999); *Trevino v. Johnson*, 168 F.3d 173, 177 (5th Cir. 1999), *cert. denied*, 144 L.Ed.2d 825 (1999); *Gerlaugh v. Stewart*, 167 F.3d 1222, 1223 (9th Cir. 1999). This Court has done the same, at least

by implication. *See Hohn v. United States*, 524 U.S. 236, 238-39 (1998) (implying that the Court of Appeals was correct in finding 28 U.S.C. § 2253 to be jurisdictional).

At least three circuits have also held that an erroneously granted certificate of appealability nonetheless grants jurisdiction to the Court of Appeals. *Soto v. United States*, 185 F.3d 48, 52 (2nd Cir. 1999); *United States v. Talk*, 158 F.3d 1064, 1068 (10th Cir. 1998), *cert. denied*, 143 L.Ed.2d 81 (1999); *Young v. United States*, 124 F.3d 794, 799 (7th Cir. 1997), *cert. denied*, 524 U.S. 928 (1998). Additionally, the Eighth Circuit, sitting *en banc*, concluded that "antecedent questions" to the merits of a habeas corpus claim may be considered. *Nichols v. Bowersox*, 172 F.3d 1068, 1070 n.2 (8th Cir. 1999) (*en banc*).

Petitioners acknowledge that they did not challenge the application for the certificate of appealability in the Court of Appeals. *See* Appendix H. However, it is axiomatic to elementary civil procedure that subject matter jurisdiction may not be waived and a party may challenge subject matter jurisdiction at any time. *See* Fed. R. Civ. P. 12(h)(3); Fed. R. Civ. P. 60(b)(4). *But see Gattlin v. Madding*, 1999 U.S. Lexis

App. 20067, *1 (9th Cir. July 12, 1999) (objection to certificate of appealability must be made within 35 days of application for certificate of appealability).

Petitioners also acknowledge that they are the Respondents in *Slack v. McDaniel*, No. 98-6322, and that this Court has ordered supplemental briefing and reargument in that case on the following two questions: "(1) Do the provisions of AEDPA, specifically including 28 U.S.C. § 2253(c) and 28 U.S.C. § 2244(b), control the proceedings on appeal? (2) If AEDPA does control the proceedings on appeal, may a certificate of Appealability issue under 28 U.S.C. § 2253(c)?" Resolution of the second question may have a direct impact on this case as well.

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This Court has held that "Congress has the constitutional authority to define the jurisdiction of the lower federal courts." *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993). Congress' enactment should be given full force in limiting the jurisdiction of the Court of Appeals. This case, along with *Slack v. McDaniel*, will allow full consideration of the limitations on jurisdiction Congress enacted when it substantially amended 28 U.S.C. § 2253 and enacted 28 U.S.C. § 2253(c). Certiorari should be granted on that basis.

DATED: November 10, 1999.

Respectfully submitted,

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD F. WILLS, JR., Petitioner-Appellant, vs. E.K. MCDANIEL and FRANKIE SUE DEL PAPA, Respondents-Appellees.	Case No. 99-15623 D.C. No. CV-N-98-00315-DWH MEMORANDUM[1]

Appeal from the United States District Court
for the District of Nevada
David Warner Hagen, District Judge, Presiding

Submitted August 10, 1999[2]

Before: BROWNING, SCHROEDER, and PREGERSON, Circuit Judges.

Nevada state prisoner Edward F. Wills, Jr. appeals pro se the district court's dismissal of his 28 U.S.C. § 2254 petition. We have jurisdiction pursuant to 28 U.S.C. § 2253(a), and we reverse and remand.

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

[2] The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. R. 34(a)(2).

On January 7, 1999, the district court dismissed the instant petition—Wills' third federal habeas petition—as a successive petition filed without prior authorization from this court as required by 28 U.S.C. § 2244(b)(3). Wills subsequently filed a request in this court for permission to file a successive petition, along with a separate request for a certificate of appealability of the district court's January 7, 1999 order.

On April 22, 1999, a motions panel of this court denied as unnecessary Wills' request to file a successive petition because the claim raised in the instant petition was dismissed as unexhausted by this court in *Wills v. Deeds*, No. 91-16902, 1994 WL 521197 (9th Cir. Sept. 23, 1994), a prior appeal. On May 27, 1999, this court granted Wills' request for a certificate of appealability as to whether the district court erred by dismissing Wills' instant section 2254 petition as successive, and took judicial notice of its April 22, 1999 order.

Because the claim Wills seeks to raise under *Sandstrom v. Montana*, 442 U.S. 510 (1979) was previously dismissed by this court for failure to exhaust in 1994,[3] *see Wills v. Deeds*,

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[3] Respondents dispute the determination that the instant petition is not successive on the grounds that Wills' first habeas petition was denied on the merits in 1991. *See Wills v. Whitley*, No. 90-15159, 1991 WL 30375 (9th Cir. Mar. 7, 1991). This court, however, explicitly rejected this argument with regard to the *Sandstrom*

No. 91-16902, 1994 WL 521197 at **2, that claim is not successive and did not require circuit authorization to be presented to the district court in a new habeas corpus petition. *See In re Turner*, 101 F.3d 1323 (9th Cir. 1997) (holding that requirements for filing second or successive petition do not apply to subsequent petitions where earlier petition dismissed for failure to exhaust).

Accordingly, we reverse the district court's dismissal and remand so that Wills' section 2254 petition may go forward.

REVERSED AND REMANDED.

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claim in *Wills v. Deeds*, No. 91-16902, 1994 WL 521197 (9th Cir. Sept. 23, 1994) (reversing district court's dismissal of Wills' second habeas petition for abuse of the writ, and remanding for dismissal without prejudice for failure to exhaust state remedies).

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

EDWARD F. WILLS,

Petitioner,

Case No. CV-N-
98-315-DWH(RAM)

vs

E.K. McDANIEL, *et al*,

ORDER

Respondents. /

Petitioner (Wills) has submitted a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondents have moved to dismiss the petition (#9) because this court lacks jurisdiction under 28 U.S.C. § 2244(b)(3)(A). Wills opposes the motion (#13) and Respondents reply (#16).

In 1987 Wills filed his first federal habeas corpus petition. *See Wills v. Whitley*, CV-N-87-109-ECR. This action was decided on the merits and the dismissal was upheld by the court of appeals. *Wills v. Whitley*, No. 90-15159 (9th Cir. 1991). In 1989, Wills brought a second federal habeas petition which was also decided on the merits. *See Wills v. Deeds*, CV-N-89-812-DHM(PHA). On appeal, the Ninth Circuit directed the district court to dismiss the petition without prejudice for failure to exhaust state court

remedies. *Will v. Deeds*, No. 91-16902 (9th Cir. 1994). Wills now brings the instant petition.

Under the provisions of the Anti-terrorism and Effective Death Penalty Act (AEDPA), "[b]efore a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application. 28 U.S.C. § 2244(a)(3)(A). As petitioner admits, no such authorization has been obtained for this petition. Wills contends that no such authorization should be required as this is a continuation of the previously dismissed 1989 petition which was dismissed without prejudice for failure to exhaust. Relying on the decision of *Stewart v. Martinez-Villareal*, 118 S.Ct. 1618 (1998), Wills argues that the AEDPA does not apply to the renewal or continuation of an action commenced prior to its enactment. This reliance is misplaced, however. In *Stewart v. Martinez-Villareal*, the Supreme Court upheld the Ninth Circuit decision that a claim brought in an earlier petition which was dismissed as premature could be renewed to the district court without prior authorization from the appeals court. Martinez-Villareal had raised a *Ford v. Wainright*, competency

claim in his original petition.[1] The district court dismissed the claim as premature because Martinez-Villareal was not set for imminent execution and the claim was, therefore, unripe. A claim that is premature is not equivalent to one that is unexhausted.

Recently, in *Ortiz v. Stewart*, 149 F.3d 923 (9th Cir. 1998), the court of appeals upheld the application of the AEDPA to persons who had filed a first petition for writ of habeas corpus prior to the enactment of 28 U.S.C. § 2244. The court stated that the,

> AEDPA provides that a prisoner seeking habeas corpus relief must enumerate all of the grounds for such relief in his first petition in federal court, unless his claim fits within one of several statutory exceptions. See 28 U.S.C. § 2244(b)(2). This court recently decided that *Lackey* claims do not fit into any of these statutory exceptions and that they consequently are barred by AEDPA.[2] *See Ceja v. Stewart*, 134 F.3d 1368 (9th Cir. 1998). Because Ortiz did not raise his *Lackey* claim in his first habeas petition, which was filed, as amended, in 1986, we are compelled by *Ceja* to reject it.

This language clearly indicates the Ninth Circuit's decision that AEDPA shall apply to petitions filed prior to its enactment, barring

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[1] *Ford v. Wainright*, 477 U.S. 399 (1986) held that the Eighth Amendment prohibits a state from "inflicting the penalty of death upon a prisoner who is insane." Competency to be executed can only be determined at a time when execution is imminent.

[2] *Lackey v. Texas*, 514 U.S. 1045 (1995) (Steven, J., dissenting from denial of certiorari). *Lackey* addressed the claim that it is cruel and unusual punishment to incarcerate someone under a sentence of death for an extended length of time.

successive petitions absent permission from the court of appeals. As a result, this petition shall be dismissed.

Counsel for Wills seeks the court's clarification as to the scope of her representation in this matter. The court had previously granted Wills' motion for appointment of counsel, appointing the federal public defender to represent Wills "in the case" (#5). A conflict was identified and CJA counsel was appointed. This appointment encompasses the entire case, however, since the action is being dismissed for lack of jurisdiction, the appointment will end with the case dismissal.

IT IS THEREFORE **ORDERED** that the motion to dismiss (#9) is **GRANTED**. The petition is dismissed for lack of jurisdiction. This clerk shall enter judgment accordingly.

Dated this 5th day of January, 1999.

DAVID W. HAGEN
UNITED STATES DISTRICT JUDGE

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD F. WILLS	)	Case No. 91-16902
	)	D.C. No. CV-
Petitioner - Appellant	)	89-00812-HDM
	)	
v.	)	
	)	**MEMORANDUM***
GEORGE DEEDS, Warden	)	
	)	
Respondent - Appellee	)	
	)	

Appeal from the United States District Court
for the District of Nevada
Howard D. McKibben, District Judge, Presiding
Argued and Submitted September 18, 1992
Submission Withdrawn November 20, 1992
Resubmitted December 8, 1993
San Francisco, California

Before: SCHROEDER, NORRIS, and BRUNETTI, Circuit Judges

BACKGROUND

Wills was convicted in 1976 on two counts of murder. On direct appeal, he challenged the sufficiency of the evidence to

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

sustain the indictment and the conviction. In 1977, the Nevada Supreme Court affirmed the conviction.

In 1983, Wills filed his first state habeas petition, which included for the first time an allegation that two of his jury instructions violated Sandstrom v. Montana, 442 U.S. 510 (1979), by improperly shifting the burden of proof on the element of intent from the prosecution to the defense. Sandstrom was decided two years after Wills had finished his direct appeal. The Nevada state district court denied the petition, ruling that Will has waived his Sandstrom claim by failing to raise it on direct appeal. Wills then appealed the denial of his petition to the Nevada Supreme Court, but his attorney did not include the Sandstrom claim in the appeal. In 1986, the Nevada Supreme Court affirmed the denial of Wills' petition.

In 1987, Wills filed his first federal habeas petition, but did not include his Sandstrom claim. We affirmed the district court's denial of the petition.

In 1989, Wills filed a second state habeas petition, which did raise the Sandstrom claim. Wills filed this petition directly with the Nevada Supreme Court, which dismissed the petition without prejudice, stating that petitioner could file his petition in the state

district court and could then appeal an adverse ruling to the state supreme court.

Rather than filing his petition in the appropriate state district court, Wills filed a second federal habeas petition, raising the Sandstrom claim and an ineffective assistance claim based on his counsel's failure to appeal the Sandstrom claim to the Nevada Supreme Court in his first state habeas petition. The federal district court adopted the U.S. magistrate's recommendation that the second federal petition constituted an abuse of the writ because Wills had not shown cause and prejudice for his failure to raise the Sandstrom issue in his first federal habeas petition. See McCleskey v. Zant, 499 U.S. 467 (1991).

DISCUSSION

This case involves a number of complex and significant procedural questions and substantive legal and factual issues. These include whether Wills' Sandstrom claim is procedurally barred due to his failure to raise it on direct appeal; whether Sandstrom applies retroactively under Teague v. Lane, 489 U.S. 288 (1989); whether the challenged jury instructions violate Sandstrom; and whether the failure of Wills' counsel to appeal the Sandstrom claim to the Nevada Supreme Court amounts to

ineffective assistance of counsel. However, we decline to reach these issues because we hold that Wills has failed to exhaust his state remedies.

Habeas corpus litigants must exhaust all available state remedies before their petition can be heard in federal court. 28 U.S.C. § 2254(b); Rose v. Lundy, 455 U.S. 509, 518-22 (1982); McQuown v. McCartney, 795 F.2d 807, 809 (9th Cir. 1986). This requirement is a matter of comity. Sweet v. Cupp, 640 F.2d 233, 236 (9th Cir. 1981).

A petitioner has exhausted state remedies if he has presented his claim to the highest state court and that court has disposed of the claim on the merits, or if state remedies are unavailabie or inadequate. See McQuown, 795 F.2d at 809. there has been no exhaustion in this case. Here, the Nevada Supreme Court carefully avoided reaching the merits of Wills' second state habeas petition by dismissing it without prejudice so that he could file it in the appropriate state district court.

Wills himself concedes that he has not "technically 'exhausted'" his claims. Wills Supp. Br. at 23. He argues, however, that interests of futility, comity, and federalism would be best served if we reach the merits of his claims. See Granberry v.

Greer, 481 U.S. 129, 135 (1987). We disagree. Interests of comity and federalism tip sharply in favor of returning this petition to the Nevada courts so that Wills can follow the dictates of the Nevada Supreme Court and file his petition in the appropriate state district court.[1]

Accordingly, we reverse the district court's order denying Wills' petition as an abuse of the writ and remand this case to the district court with instructions to dismiss the petition for failure to exhaust state remedies.

REVERSED AND REMANDED.

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[1] For this reason, we dismiss this petition without prejudice despite the State's failure to raise a non-exhaustion objection in its motion to dismiss this petition. See Granberry, 481 U.S. at 134-35 (federal court has discretion, for reasons of "comity and judicial efficiency," to "insist on complete exhaustion" even if the State has neglected to raise a non-exhaustion defense in its answer to the petition).

Wills v. Deeds, No. 91-16902

BRUNETTI, Circuit Judge, dissenting:

I believe that the district court correctly dismissed Wills' petition for habeas corpus as an abuse of the writ. Petitioner has presented absolutely nothing to suggest that he could satisfy the cause and prejudice standard of McCleskey v. Zant, 499 U.S. 467, 493 (1991), so as to excuse his failure to raise this Sandstrom claim in his first federal habeas petition. The majority's approach to this case sidesteps the Supreme Court's clear direction in McCleskey, 499 U.S. at 486-96, and could permit Wills to raise his meritless claim in yet another federal habeas proceeding. See Campbell v. Blodgett, 997 F.2d 512, 519-20 (9th Cir. 1992), cert. denied, 114 S. Ct. 1337 (1994).

Even if the state of 9th Circuit law at the time of Wills' first federal habeas petition in 1987, see Tannehill v. Fitzharris, 451 F.2d 1322, 1323 (9th Cir. 1971), but see Campbell, 997 F.2d at 520 & n.5 (rule of McCleskey applies to pending habeas petitions); Harris v. Vasquez, 949 F.2d 1497, 1512 (9th Cir. 1990) (as amended) (same), cert. denied, 112 S. Ct. 1275 (1992), sufficed to remove Wills from the confines of McCleskey, I believe he would still have abused the writ by bringing his perennially unexhausted

Sandstrom claim in a second federal habeas petition. Wills cannot have it both ways; his failure to exhaust this claim cannot constitute cause for its absence from his first petition without creating a penalty for his waste of the federal courts' time on this second petition when he has still failed to pursue his state remedies.

The majority notes that the state has failed to raise and thus may have waived a non-exhaustion objection to Wills' second petition, and then looks to Granberry v. Greer, 481 U.S. 129 (1987), as justification for dismissing the petition without prejudice. Yet Granberry did not involve a successive petition. While resort to equitable principles such as waiver is certainly appropriate in habeas corpus, see Sanders v. United States, 373 U.S. 1, 17-18 (1963), among those principles is the notion that "a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks." Id. (internal quotation and citation omitted). As the Court continued in Sanders, "[n]othing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation." I thus believe that we should affirm the district court.

Moreover, given the frailty of Wills' Sandstrom claim in the face of Teague v. Lane, 498 U.S. 288 (1989), Granberry's focus on serving "the interests of the petitioner, the warden, the state

attorney general, the state courts, and the federal courts," 481 U.S. at 135, at least counsels us to dismiss Wills' petition on substantive grounds. Wills has played hopscotch with the habeas corpus process, preventing the state judgment from achieving the finality that is "[o]ne of the law's very objects." McCleskey, 499 U.S. at 491. We should put a speedy end to his abuse of the courts' scarce resources and the concomitant frustration of both the state's sovereign power to punish Wills for his crimes and its good-faith attempts to honor his constitutional rights. Id.

I must respectfully dissent.

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD FRANCIS WILLS Petitioner-Appellant, v. HAROL L. WHITLEY, Warden Nevada State Prison; the State of Nevada, Respondents-Appellees.	)	Case No. 90-15159 D.C. No. CV-87-109-ECR **MEMORANDUM***

Appeal from the United States District Court
for the District of Nevada
Edward C. Reed, Jr., District Judge, Presiding

Submitted February 22, 1991**

Before: SNEED, REINHARDT, and O'SCANNLAIN, Circuit Judges

Edward Wills, a Nevada state prisoner, appeals pro se the district court's denial of his petition for habeas corpus. Wills was convicted of murder for his role in aiding and abetting Julius

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit rule 36-3.

** The panel unanimously finds this case appropriate for submission without oral argument pursuant to Ninth Circuit rule 34-4 and Fed.R.App.P. 34(a).

Neuschafer, Jr. in the slaying of two teenage girls. After his conviction, Wills filed a direct appeal to the Nevada Supreme Court challenging the sufficiency of the evidence at his trial. The Supreme Court affirmed his conviction. Wills v. State, 93 Nev. 443 (1977).

In 1984, Wills filed a state habeas petition which alleged that he received ineffective assistance of counsel at trial and that the state failed to convict him for the crimes charged in the indictment. After denial of the petition by the state court, the Supreme Court found that the indictment was sufficient and that the claim of ineffective assistance of counsel was procedurally barred due to laches.

Wills then filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. In his petition, he raised all three of the issues that had previously been before the Nevada Supreme Court. The district court dismissed Wills' petition with prejudice, finding that both the indictment and the evidence were sufficient and that the ineffective assistance of counsel claim was procedurally barred from review. We affirm.

. . .

. . .

STANDARD OF REVIEW

Since the highest state court has ruled on all the issues raised in his petition, Wills has exhausted his state remedies on these matters. McQuown v. McCartney, 795 F.2d 807, 809 (9th Cir. 1989). We review the district court's dismissal of the claims on the merits de novo. Barker v. Estelle, 913 F.2d 1433, 1437 (9th Cir. 1990). However, we are precluded from hearing the procedurally barred claim unless Wills can show "cause and prejudice." See Wainwright v. Sykes, 433 U.S. 72 (1977); Tacho v. Martinez, 862 F.2d 1376, 1378 (9th Cir. 1988).

DISCUSSION

The Nevada Supreme Court found that Wills' seven year delay in raising his ineffective assistance of counsel claim unduly prejudiced the state and should be barred under statutory time limitations.[1] Wills attempts to show "cause" be asserting that his transfer to New Mexico during the year following his conviction and the "lock-down" status of the Nevada prison upon his return prevented him from obtaining access to legal materials and resources necessary for him to timely file his state habeas petition. The record shows that Wills had access to state habeas forms, that

[1] N.R.S. § 38.400 provides that a rebuttable presumption of prejudice arises when a claimant fails to raise a claim within a five year period.

he filed a petition for federal habeas corpus relief, and that he had contact with an attorney hired by his family prior to the state procedural deadline. We therefore conclude that the district court properly refused to consider this claim on the ground that Wills has not demonstrated sufficient cause for his state procedural default.

Wills also contends that the State failed to convict him for the charges contained in the indictment. Nevada law allows for an aider and abettor to be charged as a principal.[2] This law was interpreted by the Nevada Supreme Court in McWilliams v. State, 87 Nev. 302, 46 P.2d 41 (1971), which found that charging a person as a principal in an indictment was sufficient notice of the charges to lead to a conviction for aiding and abetting. Since this is the law that was in effect at the time of his conviction, the indictment was sufficient.[3]

With respect to the sufficiency of evidence claim, the record shows that there is ample evidence upon which to sustain Wills' conviction as an aider and abettor. For insufficiency of the

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[2] N.R.S. 195.020 states the following: "Principals. Every person concerned in the commission of a felony ..., whether he directly commits the act ... or aids and abets in its commission ... shall be proceeded against and punished as such."

[3] In 1983, the Nevada Supreme Court overturned McWilliams, finding it necessary for the indictment to make a specific charge of aiding and abetting. Barren v. State, 99 Nev. 661, 669 P.2d 725 (1983). In its order dismissing Wills' appeal, the Nevada Supreme Court expressly held that Barren would not be applied retroactively. Order Dismissing Appeal (CR, exhibit 1), at 2.

evidence to be a grounds for reversal, we must determine whether any rational trier of fact could have found him guilty with the evidence presented at trial, viewing the evidence in the light most favorable to the prosecution. Jackson v. Virginia, 433 U.S. 307, 319 (1979).[4]

The prosecution introduced the following evidence at trial. Wills drove the car to the murder scene, helped destroy evidence of the crimes and boasted to others that "we killed some people." Before Neuschafer left to kill the first victim, he handed Wills a knife and told him "to get rid of" the other girl. Although he did not actually follow through on Neuschafer's instructions, Wills, knowing that Neuschafer intended to kill one of the girls, remained with the other girl and accompanied Neuschafer when he murdered the second victim. Thereafter, he remained in Neuschafer's company for several days, cooperated fully in destroying evidence of the crime and later told friends that "we killed some people."

Under Nevada statutes, it is necessary to show only that the crime has been committed, and that the defendant, if present, aided and assisted in the commission of the crime. See Austin v. State,

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[4] N.R.S. § 195.020 states that a person is a principal to a crime if he "aids and abets in its commission, whether present or absent; and ... directly or indirectly ... encourages another to commit a felony."

87 Nev. 578, 586, 491 P.2d 724 (1971); Harley v. State, 85 Nev. 154, 159, 451 P.2d 852 (1969). We agree with the Nevada Supreme Court, see Wills v. State, 93 Nev. 443, 566 P.2d 1138 (1977), and the district court below that there was ample evidence that Wills aided and assisted in the commission of the crime. Wills' assertion that he was an involuntary participant merely conflicts with the prosecution's evidence; the determination of which party's evidence is more credible falls within the province of the jury.

Accordingly, we conclude that the district court did not err in finding that the evidence and indictment were sufficient and that the ineffective assistance of counsel claim was barred by procedural default. The decision of the district court is therefore

AFFIRMED.

APPENDIX E

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

EDWARD F. WILLS,	)	Case No. CV-N-98-315-DWH(RAM)
Petitioner,	)	
vs.	)	ORDER
E.K. MCDANIEL, *et al.*,	)	
Respondents.	)	

Petitioner Edward F. Wills has filed a notice of appeal from the decision of this court granting respondents' motion to dismiss his petition for writ of habeas corpus. Pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure, the notice of appeal will also be considered as a request for issuance of a certificate of appealability. A certificate of appealability should be issued only where the appeal presents a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. 2253(c).

Wills previously filed two federal habeas corpus petitions which were decided on the merits (CV-N-87-109-ECR and CV-N-89-812-HDM(PHA). Pursuant to 28 U.S.C. § 2244(a)(3)(A), "[b]efore a second or successive application permitted by this

section is filed in the district court, the applicant shall move the appropriate court of appeals for an order authorizing the district court to consider the application." In the instant case, Wills did not receive authorization from the Ninth Circuit Court of Appeals before filing the instant petition. As a result, this court dismissed his petition for lack of jurisdiction.

IT IS THEREFORE **ORDERED** that Wills' request for certificate of appealability is DENIED.

Dated this 26th day of February, 1999.

DAVID W. HAGEN
UNITED STATES DISTRICT JUDGE

APPENDIX F

Edward F. Wills, #12394
Ely State Prison
P.O. Box 1989
Ely, Nevada 89301

Petitioner proceeding Pro Se.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

EDWARD F. WILLS,

Petitioner,

-vs-

E.K. McDANIEL, et al.,

Respondents.

/

Case No. CV-N-98-315-DWH(RAM)

APPLICATION FOR CERTIFICATE OF APPEALABILITY

The petitioner, Edward F. Wills, hereby makes this application for certificate of appealability, pursuant to section 2253(c), to this Court for the issuance of the certificate following this Court's Order dismissing the Petition for writ of habeas corpus for lack of jurisdiction.

FACTS

Petitioner, Edward F. Wills, filed the instant petition pursuant to 28 U.S.C. 2254. The respondent then filed a Motion to

dismiss claiming this court lacked jurisdiction over the petition. Petitioner opposed the motion. On January 5th, 1999, this court entered an order dismissing the petition for lack of jurisdiction.

POINTS AND AUTHORITIES

A certificate of appealability is appropriate where a petitioner can show a "substantial showing of a denial of a federal right." See, Lynch v. Blodgett, 999 F.2d 401, at 403 (9th Cir 1993). To satisfy the "substantial showing" standard, a petitioner "must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." Barefoot v. Estelle, 103 S.Ct. 3395, n. #4.

In the instant case, there are numerous appellate issues that are debatable among jurists of reason. Herein, petitioner presents a number of appellate issues.

1. It is at least debatable among jurists of reason that this Court errored when it concluded erroneously, in a finding of fact, that the second habeas petition was decided on the merits, when in fact it had been dismissed as an abuse of the writ. This is crucial because a petition cannot be successive unless the issues raised were decided on the merits. Also, clearly stated in the order,

is the statement that the "petition is an abuse of the writ". This finding of fact was erroneous and could be construed as an abuse of discretion under Neuschafer v. Whitley, 860 F.2d 1470 (9th Cir. 1988).

2. It is at least debatable among jurists of reason that this court made an erroneous conclusion of law, reversible under Neuschafer, when it concluded that the petitioner, whose claims contained in the instant petition had been dismissed without prejudice for failure to exhaust state remedies, was required to seek prior permission before filing the instant petition. This conclusion is clearly erroneous in light of In Re Turner, 101 F.3d 1323 (9th Cir. 1996) (permission to file a subsequent petition under Anti-Terrorism Act not required where first petition was dismissed for failure to exhaust state remedies).

CONCLUSION

Because there exists in this case issues that are debatable, Wills respectfully requests that this Court issue a Certificate of Appealability so that his appeal may proceed.

Dated this 19th day of January, 1999.

EDWARD F. WILLS
Edward F. Wills, #12394

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Application for Certificate of Appealability was mailed to:

(Pursuant to F.R.C.P. Rule 5(b))

David K. Neidert
Deputy Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717

on this 19th day of January, 1999.

EDWARD F. WILLS
Edward F. Wills, #12394

APPENDIX G

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD F. WILLS, JR., Petitioner-Appellant, v. E. K. MCDANIEL and FRANKIE SUE DEL PAPA, Respondents-Appellees.	No. 99-15623 DC# CV-98-00315-DWH ORDER

Before: FERNANDEZ, W. FLETCHER, Circuit Judges.

The request for a certificate of appealability is granted with respect to the following issue: whether the district court erred by concluding that petitioner's 28 U.S.C. § 2254 petition was successive. *See* 28 U.S.C. § 2253(c)(2). Appellant's request that this court take judicial notice of its prior order, which declared the petition was not successive, is granted. *See In re Wills*, No. 95-80376 (9th Cir. Apr. 22, 1999) (order denying petition for permission to file successive habeas corpus petition as unnecessary)

Within 14 days of the filing date of this order, respondents shall file a statement of nonopposition to summary reversal or show

cause why this court should not reverse and remand this matter to allow the petition to go forward. Appellant may respond within 10 days after service of respondent's statement or memorandum.

If respondents do not comply with this order, the appeal will be referred to a motions panel for summary disposition. *See* 9th Cir. Rule 3-6.

Appellant is granted leave to proceed in forma pauperis.

APPENDIX H

FRANKIE SUE DEL PAPA
Attorney General
DAVID K. NEIDERT
Deputy Attorney General
Nevada Bar No. 4342
Criminal Division
100 North Carson Street
Carson City, Nevada 89701-4717
Telephone: (775) 684-1271

Attorney for Respondents

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD F. WILLS, JR., Petitioner-Appellant, v. E. K. McDANIEL, *et al.*, Respondents-Appellees.	No. 99-15623 D.C. No. CV-N 98-315-DWH **RESPONSE TO COURT ORDER FILED MAY 27, 1999**

Respondents, by and through counsel, FRANKIE SUE DEL PAPA, Attorney General of the State of Nevada, and DAVID K. NEIDERT, Deputy Attorney General, respectfully respond to this Court's Order directing Respondents to either file a statement of nonopposition to summary reversal or to show cause why this Court

should not reverse and remand this matter so that Petitioner EDWARD F. WILLS, JR. ("Wills") might go forward with his Petition.

POINTS AND AUTHORITIES

Under the Anti-terrorism and Effective Death Penalty Act (AEDPA), Congress decreed that before "a second or successive application permitted by this section is filed in the district court, the applicant *shall* move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. § 2244(b)(3)(A) (emphasis added).

In this case, Wills has had a prior adjudication of a federal habeas corpus petition on the merits. *Wills v. Whitley*, CV-N-87-1090-ECR, *aff'd*, No. 90-15159 (9th Cir. 1991) (*Wills I*). This Court can take judicial notice of its own prior proceeding. *Calderon v. United States District Court (Hill)*, 120 F.3d 927, 928 (9th Cir. 1997).

Subsequently, Wills sought a second petition for a writ of habeas corpus in federal court. *Wills v. Deeds*, CV-N-89-812-HDM(PHA), *rev'd and ordered dismissed*, No. 91-16902 (9th Cir. 1994) (*Wills II*). *Wills II* was reversed and the petition ordered dismissed without prejudice because it contained unexhausted

claims. However, this second petition does not change in any way the fact that Wills has had a prior adjudication on the merits of a federal habeas corpus petition. Thus, 28 U.S.C. § 2244(2) applies to this petition.

Respondents acknowledge that if *Wills II* were the *only* prior petition, Wills' current petition would not be a "second or successive petition" under the AEDPA. *In re Turner*, 101 F.3d 1323, 1323 (9th Cir. 1996). However, *Wills I* did include a prior adjudication on the merits. Had the AEDPA been in effect at the time Wills filed *Wills II*, he would have needed permission from this Court in order for the petition to be considered. There is no case authority that the successive petition requirements of 28 U.S.C. § 2244(b)(3) do not apply to petitioners like Wills who had a prior petition decided on the merits and had a subsequent, pre-AEDPA petition dismissed without prejudice.

Indeed, this year the Second Circuit concluded that the AEDPA applied to petitions filed after the AEDPA's effective date, regardless of when a prior petition was filed. *Mancuso v. Herbert*, 166 F.3d 97, 101 (2nd Cir. 1999). By logical extension, 28 U.S.C.

§ 2244(b)(3) applies to this action, and Wills needed permission from this Court to file a successive petition.[1]

Additionally, the First Circuit has noted that for purposes of defining a "second or successive petition" under the AEDPA, an abuse of the writ analysis is used. *United States v. Barrett*, 1999 U.S. App. Lexis 10926 (1st Cir., May 27, 1999) (collecting cases). Since Wills' current petition would be "abusive" under that standard because he has had a prior petition adjudicated on the merits (*Wills I*), then the petition which Judge Hagen dismissed for lack of jurisdiction is clearly "successive."

The other exception for not requiring permission to file a successive petition does not apply. *See Stewart v. Martinez-Villareal*, 118 S.Ct. 1618, 1621 (1998) (the AEDPA successive petition rule does not apply to issues which were not ripe at time of filing first petition). All of the claims which Wills seeks to raise now were known to him at the time he filed his second federal habeas corpus petition. As the United States District Judge who dismissed Wills' petition in 1991 found, "The record clearly establishes that the petitioner knew of the issues regarding the

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[1] Respondents acknowledge that the Motions Panel of this Court has ruled that Wills did not need permission to file a successive petition. Respondents have filed a Motion to Reconsider that ruling. Respondents ask this Court to take judicial notice of that pleading.

validity of the jury instructions at the time he filed his first federal habeas corpus petition." *See* Wills' Exh. E, p. 1.

Certainly, this Court is empowered to grant permission for Wills to file a successive petition if Wills can "make a *prima facie* showing" that he can satisfy 28 U.S.C. § 2244(b). However, the fact remains that Wills had a prior petition denied on the merits and his current claims would be subject to dismissal as an abuse of the writ. As a result, summary reversal is unwarranted since the United States District Judge was clearly correct in dismissing the petition for lack of jurisdiction.

RESPECTFULLY SUBMITTED this 4th day of June, 1999.

FRANKIE SUE DEL PAPA
Attorney General

By: DAVID K. NEIDERT
DAVID K. NEIDERT
Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 4th day of June, 1999, I served a copy of the foregoing RESPONSE TO COURT ORDER FILED MAY 27, 1999, by placing said document in the U.S. Mail, postage prepaid, addressed to:

EDWARD F. WILLS, JR. (#12394)
Ely State Prison
Post Office Box 1989
Ely, Nevada 89301

DORENE A. WRIGHT

No. 99-1159

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2000

E. K. McDANIEL, Warden, Ely State Prison

Petitioner,

v.

EDWARD F. WILLS, JR.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDWARD F. WILLS, JR.
Ely State Prison
Post Office Box 1989
Ely, Nevada 89301-1989

Respondent in proper person
Respondent in forma pauperis

RECEIVED
APR 5 - 2000
OFFICE OF THE CLERK
SUPREME COURT, U.S.

E. K. McDANIEL, Petitioner

v.

EDWARD F. WILLS, JR., Respondent

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The respondent, Edward F. Wills, Jr., asks for leave to file the attached brief in opposition to petition for writ of certiorari, without prepayment of costs and to proceed in forma pauperis. Respondent has been granted leave to so proceed in the District Court and in the United States Court of Appeals for the Ninth Circuit. No affidavit is attached, inasmuch as the District Court appointed counsel for respondent. Current counsel however, is not yet a member of the Supreme Court Bar.

Respectfully submitted,

Edward F. Wills, Jr., #12394
Ely State Prison
P.O. Box 1989
Ely, Nevada 89301-1989

Respondent in proper person

I.

ISSUES RAISED BY RESPONDENT

WHETHER THE ISSUES RAISED BY PETITIONERS HAVE ALREADY BEEN ADDRESSED BY THIS COURT IN A PRIOR DECISION, AND HAVE BEEN RESOLVED IN FAVOR OF THE RESPONDENT

WHETHER THE PETITIONERS CLAIM THAT THE CURRENT FEDERAL HABEAS CORPUS PETITION OF RESPONDENT IS A SUCCESSIVE PETITION CAN BE MAINTAINED UNDER THE DOCTRINE OF JUDICIAL ESTOPPEL

WHETHER THE PETITIONERS HAVE MISTATED THE LAW WHEN THEY RELIED ON STEWART V. MARTINEZ-VALLAREL, IN THEIR PETITION FOR WRIT OF CERTIORARI

II.

ARGUMENT

The petitioner has asked this Court to grant Certiorari based upon, in their view, a violation of the provisions of the Anti-terrorism and Effective Death Penalty Act (AEDPA). This position is flatly wrong. The provisions of AEDPA do not apply retroactively to the Respondent's Petition for Writ of Habeas Corpus. Respondent's Habeas Petition was pending in the Ninth Circuit Court of Appeals (Respondent Wills had been remanded back to state court to exhaust state remedies when AEDPA was passed by Congress) and based upon this Court's own decision in Lindh v. Murphy, 117 S.Ct. 2059 (Amendments to habeas corpus statute by AEDPA did not apply to pending non-capitol cases) the Respondent should be allowed to proceed with his Habeas Petition in Federal Court.

The petitioner has now also taken an inconsistent legal position. During his second federal habeas petition through the federal courts, the petitioner claimed that it was an abuse of the writ. The federal district court agreed and dismissed the petition. The Ninth Circuit reversed this decision. The petitioners are now claiming that the same petition is a successive one. This violates the doctrine of Judicial Estoppel, which bars a party from taking inconsistent positions in the same litigation. See, Morris v. State of California, 966 F.2d 488 (___Cir.), cert. denied 113 S.Ct. 96.

The petitioners have also mistated the law to this court. They have insisted that under Stewart v. Martinez-Vallarel, 118 S.Ct. 1618, the respondent is filing a successive petition when

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he returned to federal court after having his habeas petition dismissed without prejudice so that he would be able to exhaust state remedies. In fact Martinez-Valleral states no such law.

WHEREFORE, Respondent prays that the Petition for Writ of Certiorari be denied.

Dated this 28th day of March, 2000.

By: Edward F. Wills

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P.O. Box 1989
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Respondent in proper person
and in forma pauperis

CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury, declares and certifies that on this date he did personally cause the foregoing Brief in Opposition to Petition for Writ of Certiorari to be placed in the U.S. Mail and addressed as follows:

Frankie Sue Del Papa
Attorney General
State of Nevada
David Sarnowski
Deputy Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717

Dated this 28th day of March, 2000.

Edward F. Wills

Edward F. Wills